

**August 21, 2008**

**DECISION AND ORDER  
OF THE DEPARTMENT OF ENERGY**

**Appeal**

Name of Petitioner: BPA Watch  
Date of Filing: June 25, 2008  
Case Number: TFA-0263

On June 25, 2008, BPA Watch filed an Appeal from a determination issued to it on May 30, 2008, by the Bonneville Power Administration (BPA) of the Department of Energy (DOE) in response to a request for documents that BPA Watch submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require that BPA release responsive material.

**I. Background**

BPA Watch is a web site that provides news, analysis and commentary about BPA, a federal power marketing agency headquartered in Portland, Oregon. On March 31, 2008, BPA Watch requested copies of certain records that BPA had provided to a federal district court in Portland, Oregon in response to a federal criminal subpoena. BPA Watch requested the following: “[c]alendars in hard copy or electronic form (i.e., Microsoft Outlook) for three BPA employees for the years 2001-2003: Mark A. Reynolds; Mark Wilczewski; and Chuck Meyer.” Letter from BPA Watch to BPA (March 31, 2008).<sup>1</sup> On May 30, 2008, BPA issued a partial response to the request and informed BPA Watch that it had no responsive records for Mark A. Reynolds. Letter from BPA to BPA Watch, May 30, 2008 (Determination). The agency also explained that paper copies of the electronic calendars of Mark Wilczewski (Wilczewski) and Chuck Meyer (Meyer) did exist, but that they were being withheld because BPA considered the documents to be personal records of those individuals, and not agency records, and personal records are not subject to release under the FOIA. BPA Watch appealed this determination and asked OHA to order BPA to release the withheld material. Letter from BPA Watch to OHA (June 26, 2008) (Appeal).

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<sup>1</sup> I note that BPA Watch stated in its appeal that it is not requesting the disclosure of any personal items on the calendars. Appeal at 2.

## II. Analysis

### A. The Test for Agency Records

Although the purpose of the FOIA is to provide public access to federal agency records that are not exempt from disclosure, the statutory language of the FOIA does not define an agency record, but merely lists examples of the types of information that agencies must make available to the public. *See* 5 U.S.C. § 552(a). Consequently, in order to distinguish agency records from personal records, federal courts have applied a “totality of the circumstances” test. This test “focus [es] on a variety of factors surrounding the creation, possession, control, and use of the document by an agency.” *Consumer Federation of America v. Dep’t of Agriculture*, 455 F.3d 283, 287 (D.C.Cir. 2006) (citing *Bureau of Nat’l Affairs, Inc. v. Dept of Justice*, 742 F.2d 1484, 1490 (D.C.Cir. 1984)). Courts have identified four relevant factors for an agency to consider when determining whether the agency has control over a document: (1) the intent of the record’s creator to retain or relinquish control over the record; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the record; and (4) the extent to which the record was integrated into the agency’s recordkeeping system or files. *Consumer Federation of America*, 455 F.3d at 288 n.7.

Both parties in this case agree that the “totality of the circumstances test” is the appropriate standard for adjudicating this matter. *See* Appeal at 3; Determination at 1, 4. In their arguments, the parties refer to three cases that are instructive regarding the issue of whether records created by an agency employee using agency resources are properly classified as agency records or as personal records.

In the first case, *Bureau of National Affairs, Inc. v. Dep’t of Justice*, 742 F.2d 1484 (D.C. Cir. 1984) (*BNA*), the United States Court of Appeals for the District of Columbia Circuit was asked to decide whether appointment calendars and daily agendas of a government official were agency records subject to disclosure under FOIA. The daily agendas were prepared by the official’s secretary and distributed to his staff so that they would know his schedule. *BNA*, 742 F.2d at 1487. The appointment calendars were used to organize personal and business activities. Top level assistants occasionally had access to the calendars, paper documents located on the official’s desk, in order to determine the availability and location of the official. However, the calendars were not distributed to other employees. *BNA*, 742 F.2d at 1495. The court concluded that the agendas (created for the purpose of informing others of the daily activities of the official and distributed to other employees) were agency records, but the calendars (created for the personal convenience of the official and not distributed) were not.

The remaining cases are more recent and involve requests for both electronic and paper documents. In 2004, the United States District Court for the District of Columbia considered a request for the appointment calendar of the SEC chairman. *Bloomberg v. Securities and Exchange Commission*, 357 F. Supp. 2d 156, 163 (D. D.C. 2004). This was a personal calendar maintained on the agency computer system that was created for the personal use of the chairman, not as an official record of his schedule. The chairman’s Chief of Staff and Deputy Chief of Staff viewed the calendar on

occasion to determine the availability of the chairman, but the calendar did not circulate. The Court found that the appointment calendar was a personal record based on its limited distribution, its creation for personal use, and the fact that the agency allowed its employees limited use of government equipment for personal needs. *Id.* at 164.

In the third case, the United States Court of Appeals for the District of Columbia Circuit in 2006 considered whether the electronic appointment calendars of six officials of the Department of Agriculture were agency records. *Consumer Federation of America*, 455 F.3d at 283. Five of the officials distributed their calendars to other employees, including their secretaries, assistants, and colleagues. The sixth official was a lower level employee who distributed his calendar to his secretary only. *Id.* at 286. Using the totality of the circumstances test, the court determined that the use of the documents was the decisive factor because their creation, possession and control were not dispositive under the facts of the case. *Id.* at 291. The court found that the calendars of the five higher level officials were similar to the agendas in *BNA* because they were used to communicate availability of the five officials and because they were distributed to other employees. *Id.* at 292-3. Thus, the court concluded that these five calendars were agency records. However, because there was no evidence that other employees either relied on the calendar of the sixth official (with the exception of his secretary) or received copies of that calendar, the court found that the calendar of the sixth official was a personal record. *Id.* at 293.

## **B. Arguments of the Parties**

BPA argues that the records requested are not agency records, but rather the personal records of Meyer, a BPA vice president, and Wilczewski, a BPA economist. Using the “totality of the circumstances” test, BPA highlighted the following significant facts. First, BPA noted that the calendars of both men contained personal as well as business entries, only Meyer and his assistant made entries in Meyer’s electronic calendars, and Wilczewski gave access only to his secretary. However, Meyer’s subordinates had access to his calendars “to know where he was and when he was available.” Determination at 2. Second, although both calendars were maintained on BPA’s Microsoft Outlook, neither the BPA computer administrator nor the BPA records custodian took control of the calendars. Third, there was no substantive agency-related information in the calendars. Finally, BPA does not require its employees to keep their calendars as agency records, and there are no BPA records retention schedules that apply to calendars. BPA admits that this fact is not dispositive. Determination at 2.

BPA asserts that the responsive material is similar to the appointment calendars that were requested in *BNA*-- the Meyer and Wisczlewski calendars were not placed into BPA files, the employees were allowed to dispose of the calendars at their discretion, and a few staff members had access to the calendars to determine the officials’ availability. BPA contends that the presence of personal information classifies the calendars as personal records absent a showing of agency control over the documents. In support of its position, BPA also cited *Bloomberg*, where the court found that the Chairman’s calendar was a personal record, even though two staff members also had access. BPA alleges that *Consumer Federation of America* can be distinguished because the court in that case could not determine if the calendars were part of the agency files, or if the employees were free to

dispose of their calendars as they wished. BPA argues that the Meyer and Wilczewski calendars were created for the personal convenience of the owners, who could have deleted them at any time. BPA had no control over the calendars, and only retained them in response to discovery requests. *Id.*

BPA Watch sets forth several arguments. First, the requester maintains that the calendars are agency records because BPA retained them in response to a subpoena. Second, the requester argues that BPA has released calendars as agency records in the past, and the withholding in this case presents an unjustified change in previous policy. Third, because the BPA Records Manual defines records broadly and requires retention of records concerning certain legal issues, BPA Watch contends that the responsive material should be considered agency records. Appeal at 7. Fourth, BPA Watch argues that the agency erred in emphasizing the very limited number of people who can make entries on the calendars when emphasis is more properly placed on the number of people who have access to the calendars. Finally, BPA Watch contends that BPA has dismissed the importance of the *Consumer Federation of America* finding that the USDA appointment calendars were agency records because they had “use characteristics” similar to the agendas in *BNA*, i.e., the calendars were distributed to employees, and those employees relied on the calendars in the performance of their duties. The requester maintains that this case is key to adjudicating the matter at hand.

### **C. Whether the Calendars Are Agency Records**

It is clear that the documents (electronic appointment calendars) were created by agency employees using agency resources. However, it is not clear from the limited information in the Determination whether BPA had control over the calendars. When faced with conflicts in the first three factors, courts have been compelled to determine how the responsive material was used in order to determine whether that material is an agency record. *See Consumer Federation of America*, 455 F.3d at 290-291 (determining classification of document based on its use when creation, possession and control are not dispositive in determining whether calendars are agency records); *BNA*, 742 F.2d at 1492 (discussing relevance of use in inquiry into whether record is an agency record). *See also Charles Frazier*, 27 DOE ¶ 80,106 (January 28, 1998) (Case No. VFA-0261) (determining classification of record based on its use when other factors are in conflict).

#### **1. The Wilczewski Calendars**

I find that the Wilczewski calendars are not agency records. Wilczewski, an economist, created his calendars for personal convenience. Only Wilczewski and his secretary (or her replacement) had access to his calendars. Even though he kept both business and personal appointments on his calendars, they are very similar to the appointment calendar of the SEC chairman in *Bloomberg* (only the owner of the calendar and two staff members had access), the appointment calendar of the Department of Justice official in *BNA* (calendar was not distributed to other employees, but retained for the convenience of the official), and the calendar of the lower level USDA official in *Consumer Federation of America* (distributed only to his secretary). In those cases, the court found that the calendars were personal records. Similarly, this office has previously found that an appointment calendar that is not distributed to other employees is a personal record. *See Charles Frazier*

(appointment calendars of agency official found to be personal records where distribution was limited to secretary).

As guided by *BNA*, I have examined the totality of the circumstances surrounding the creation, maintenance, and use of Wilczewski's calendars to determine whether they are agency records or merely employee records that happen to be located physically within the agency. *BNA*, 742 F.2d at 1493. It is true that the calendars were created and maintained by an agency employee, and subject to regular computer maintenance by BPA technical personnel. However, the employee did not distribute the calendars to any of his colleagues, maintained the calendars for his own convenience, and also kept personal information on the calendars. Further, Wilczewski was free to dispose of the calendars as he wished.<sup>2</sup> Thus, I find that Wilczewski's calendars are not agency records.

## 2. The Meyer Calendars

After a review of the case law and the specific facts of this case, I conclude that the Meyer calendars are agency records. Meyer, a high level employee, created the calendars using agency resources and, similar to Wilczewski, was free to dispose of the calendars as he wished. However, Meyer, a BPA vice president, gave his staff members access to the calendars so that they could determine his availability. The Meyer calendars are similar to the calendars of the five higher-level officials in *Consumer Federation of America*, where the staff members relied on the calendars of the officials for the same reasons that Meyer's subordinates relied on his calendars – to determine the availability of another agency employee and to avoid double booking of work-related appointments. The BPA employees relied on Meyer's calendars in performing their duties, and thus his calendars were a part of BPA daily operations. As stated in *Consumer Federation of America*,

Allowing others to have routine computer access to a calendar is more like distributing hard copies than it is like permitting occasional glances at a document on a desk. *In allowing computer access, the official surrenders personal control over the document and indicates that it will be used by others to plan their own workdays.*

*Consumer Federation of America*, 455 F. 3d at 292 n.16 (emphasis added).

The USDA calendars were electronically “distributed” to the listed recipients who used them to schedule agency meetings and prevent conflicts. *Id.* at 292. Meyer's subordinates used his calendars to plan their workdays, just as the USDA employees used the calendars of their superiors

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<sup>2</sup> BPA Watch argues that the calendars are agency records because the agency did not refuse to disclose them in response to a discovery request in a criminal case. BPA Watch suggests that BPA could have asserted that the calendars were personal records and not subject to the criminal subpoena. I am not persuaded that maintaining a record in a government office in response to a criminal subpoena converts that record to an agency record. The mere presence of the document in the agency offices does not create an agency record. *See Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 157 (1980). “To be agency records, something more than mere possession of the records by an agency official must be shown. Some nexus between the agency's work and the records must be established.” *BNA*, 742 F.2d at 1491 (quoting *Illinois Institute for Continuing Legal Education v. Dep't of Labor*, 545 F. Supp. 1229, 1233-34 (N.D. Ill.1982)). Under the facts of this case, a criminal subpoena does not establish this nexus.

in *Consumer Federation of America*. For the reasons stated above, I find that the Meyer appointment calendars are agency records.

### **III. Conclusion**

I conclude that the Meyer appointment calendars are agency records, and subject to release under FOIA. I further conclude that the Wilczewski appointment calendars are personal records and thus not subject to release under the FOIA.<sup>3</sup> Accordingly, this Appeal is granted in part. BPA shall either release the 2001-2003 appointment calendars of Chuck Meyer, or issue a new determination to justify its withholding of any portion of the calendars.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by BPA Watch on June 25, 2008, OHA Case Number TFA-0263, is hereby granted in part and denied in all other respects.

(2) BPA shall either release the 2001-2003 calendars of Chuck Meyer or issue a new determination to justify its withholding of any portion of the calendars.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli Marmolejos  
Director  
Office of Hearings and Appeals

Date: August 21, 2008

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<sup>3</sup> I am not persuaded by BPA Watch's argument that BPA should release the Meyer and Wilczewski calendars because the BPA Records Manual defines records broadly. Courts have stated that federal records management statutes "cannot be used as the divining rod for the meaning of 'agency records' under FOIA." *Consumer Federation of America*, 455 F.3d at 289 (citing *BNA*, 742 F.2d at 1493).